

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Federal-State Joint Board on)	CC Docket No. 96-45
Universal Service)	
)	
Changes to the Board of Directors of the)	CC Docket No. 97-21
National Exchange Carrier Association, Inc.)	
)	
USAC Plan of Reorganization)	DA 98-1336

COMMENTS

BellSouth Corporation, on behalf of itself and its affiliated companies (hereinafter "BellSouth") files these comments in response to the Commission's Public Notice of July 15, 1998 ("Notice").¹ The Notice seeks comment on a proposed consolidation of the three corporations presently charged with administration of universal service support mechanisms. Specifically, the Notice announces an intention to merge the Schools and Libraries Corporation ("SLC") and the Rural Health Care Corporation ("RHCC") into the Universal Service Administrative Company ("USAC"). Under this plan USAC will assume responsibility for certain common administrative functions (e.g., office space, insurance, personnel), while operational matters unique to the several universal service programs will be under the direction of three new USAC divisions: the High Cost and Low Income Division, the Schools and Libraries Division and the Rural Health Care Division. Three corresponding committees will be established on the USAC Board of Directors, whose decisions within their respective areas of responsibility will be binding

¹ Public Notice, *Common Carrier Bureau Seeks Comment on Administration of Federal Universal Service Support Mechanisms*, CC Docket Nos. 97-21 and 96-45, DA 98-1336, released July 15, 1998.

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on the USAC Board unless overridden by a two-thirds vote of a quorum of directors. In addition to this organizational realignment, the Notice solicits comment on an appropriate review process, through which parties aggrieved by a decision of the USAC Board and/or a committee of the USAC Board may seek redress from the Commission.

As explained below, BellSouth has no major objection to the proposed restructure of the USAC, SLC and RHCC; however, BellSouth remains concerned that these corporations—as presently constituted or as proposed under the Notice—will continue to exercise improper control over substantive aspects of the universal service program in derogation of statutory law. Moreover, the appeal process described in the Notice will exacerbate this wrongful delegation of authority to USAC. It is unduly cumbersome, will create significant delay in issue resolution and arguably violates due process guarantees of the Administrative Procedures Act.

At the invitation of SLC and RHCC, BellSouth has participated in industry groups to provide feedback regarding implementation issues. As both a contributor to the universal service fund and as a major provider of telecommunications services, BellSouth seeks to promote an efficiently run program which will provide customers with the full benefits to which they are entitled without imposing an undue burden on the Company's shareholders. With this background and interests, BellSouth offers the following comments.

DISCUSSION

1. *Revised Administrative Structure*

The merger of SLC and RHCC into USAC may potentially provide some benefit through elimination of duplicate administrative functions, which each entity currently

performs on its own behalf.² In addition, the corporate dissolution of SLC and RHCC may resolve at least one of the legal objections which has been raised to the Commission's implementation of universal service support for schools and libraries and rural health care providers.³ BellSouth has identified no countervailing circumstances which favor retention of the present organizational structure or suggest that a third alternative would be likely to produce greater benefits. After adopting the plan, the Commission should continue to take the appropriate action and review savings to ensure the program is run efficiently. A quantification of savings as a regular part of USAC's budget and funding filings will continue to allow efficiency data to be made available to all members of the public—and to telecommunications providers, whose contributions to universal service will continue to fund USAC operations.

Whether or not the proposed restructure is adopted, BellSouth remains troubled by the absence of any clear delineation of the powers and duties of SLC and RHCC. As corporations these entities have made decisions affecting substantive rights under the universal service program without the benefit of a public record and with little or no accountability on the part of the decisionmakers.⁴ The Notice offers no assurance that as

² The Executive Summary attached to the Notice identifies the following functions for immediate consolidation: "office space, insurance, employee benefits and human resources, administrative policies, procedures and practices, accounting systems, auditing, reporting to federal agencies and Congress, budget, liaison with FCC and carriers, regulatory filings, counsel, information systems, invoice processing, boards and management." Executive Summary, p. 3.

³ See GAO Report, B-278820, February 10, 1998; which concluded that the incorporation of SLC and RHCC was done without express statutory authority and thus violated provisions of the Government Corporation Control Act, 31 U.S.C. Sec. 9102.

⁴ For example, SLC has issued a ruling that wide area networks (WANs) offered by non-telecommunications providers may nevertheless qualify for discounts as an internet access connection if they afford internet access capability. This determination is clearly at odds with the Commission's holding in the *Fourth Order on Reconsideration*. In the Matter of Federal-State Joint Board on Universal Service, CC

divisions of USAC, the SLC and RHCC will be any more constrained in their interpretive activities than they have been previously.

Although the SLC and RHCC are ostensibly limited to administrative decisions, time pressures created by a program implementation date of January 1, 1998 and lack of detail in Commission orders, have contributed to these corporations' making policy decisions which should have been made by the Commission through a process of public notice and comment. Clearly there has been no lack of effort on the part of applicants, SLC, RHCC and service providers to resolve the multitude of implementation issues; however, severe time constraints have required the program administrator to initiate funding decisions before a number of complex issues regarding program eligibility have been resolved. In its effort to implement the program, it appears the SLC has received inadequate supervision and direction from the Commission. Understandably, this has led the SLC to make decisions in certain areas, which while necessary to proceed with implementation, are arguably outside the scope of administrative issues and thus not within the SLC's authority to address (*e.g.*, interpretations respecting program application to Wide Area Networks, contract issues and eligibility of various equipment).

BellSouth also submits that many of the administrative difficulties which plague the program do not originate from the present USAC, SLC or RHCC corporate structure. It is questionable—absent other corrective action by the Commission—whether these problems will be cured by the proposed reorganization. Many such problems appear to stem from the Commission's inclusion of internal connections within the class of services qualifying for discount treatment. The procurement process and customer/vendor

Docket No. 96-45, *Fourth Order on Reconsideration in CC Docket No. 96-45*, 13 FCC Rcd 5318 (1997), para. 193.

relationship is so different between telecommunications service providers and internal connections vendors that the SLC has faced major difficulty in trying to develop a single set of program rules that address both categories.⁵ At a minimum, the Commission should consider developing administrative guidelines specific to internal connections and separating this application process from the process employed for telecommunications service and internet access.⁶ For example, telecommunications service vendors could have administrative procedures which correspond to other regulatory oversight, while internal connections vendors may require different procedures addressing safety net concerns unique to their procurement and customer relationship characteristics.

Apart from the issues raised through inclusion of internal connections in the program, the complex reimbursement process adopted by the Commission has proven to be administratively burdensome and expensive for all program participants—service providers, fund recipients and program administrators alike. These procedural matters must be addressed by the Commission, with input from the restructured USAC.⁷

⁵ In contrast to telecommunications service providers, internal connections vendors generally do not have long term recurring billing relationships with applicants. Generally, the business model for these companies consists of a one-time purchase with ongoing obligations limited to the terms of equipment warranties and maintenance agreements (for which performance is often assigned to a third party). Additionally, these equipment vendors extract funds from a program to which they make no contribution.

⁶ BellSouth and numerous other parties have challenged the Commission's determination to include internal connections within the statutory definition of "services" qualifying for discount under Section 254. This litigation is pending in the Fifth Circuit *sub nom* Texas Office of Public Utility Counsel, *et al.* v. F.C.C., Case No. 97-60421, filed June 18, 1997.

⁷ For example, application forms can be restructured with guidance from vendors and applicants to increase accuracy and reduce required completion time.

2. *Composition of USAC Board*

The Notice proposes retention of the current seventeen-member USAC Board, plus the appointment of a USAC CEO having general responsibility for program administration. A candidate for the position of CEO will be initially identified by the Board, with final selection contingent upon the approval of the Commission Chairman. In a separate statement accompanying the Notice, RHCC proposes the addition of two directors to the USAC Board, who will represent the interests of rural health care providers.

BellSouth shares the concern of RHCC that the USAC Board, as presently constituted lacks balanced representation of all interests—provider and recipient—under the universal service program.⁸ Accordingly, BellSouth would not oppose the addition of two RHCC members, although this action should not be at the expense of telecommunications service provider representation on the Board. Further, BellSouth favors selection of Board members by the professional/trade organization of the group represented (*e.g.*, selection of LEC representative by USTA), rather than appointment by the Commission or Commission Chair.

BellSouth submits that demonstrated managerial ability should be the major selection criterion for choosing the USAC CEO. Further, BellSouth believes that CEO

⁸ From the earliest days of the expanded universal service program, BellSouth has stressed the importance of selecting a fair and unbiased fund administrator and identified the means for achieving this objective. *See* In the Matter of Changes to the Board of Directors of the National Exchange Carrier Association, Inc., CC Docket No. 97-21, *Comments of BellSouth in Response to NOI*, March 3, 1997. “A bidding company may be considered to be fair and impartial either: 1) by having a board not aligned or associated with any particular industry segment and not having a direct financial interest in the support mechanisms established by the Commission; or 2) by having a balanced board composed of representatives of each of the affected industry segments, both contributors and recipients.” *Id.* at pp. 2-3.

selection should be entrusted to the USAC Board (*e.g.*, through a 2/3 majority vote) and not made contingent upon approval of the Commission Chairman. The Chairman would, however, retain authority to remove the CEO upon a showing of good cause.⁹

3. *Commission Oversight*

USAC, SLC and RHCC lack both the statutory authorization and the resources to perform an adjudicative function.¹⁰ Nevertheless, these entities have issued rulings affecting substantive rights without affording interested parties the procedural safeguards of notice and hearing guaranteed by the Administrative Procedures Act.¹¹ This system requires parties to accept the consequences of such *ultra vires* decisions while they prosecute what frequently devolves into a lengthy appeal before the Commission.

Accordingly, all disputes concerning administration of the universal service program should be heard in the first instance by the Commission. Where the case does not present novel questions of fact or law, an initial decision may be rendered by the Common Carrier Bureau pursuant to its delegated authority; in all other cases, the decision must be rendered by the Commission. In either event, the decision must be memorialized by a writing setting forth the nature and reasons for the action taken.¹²

⁹ BellSouth likewise supports proposals that USAC division heads be authorized to hire and fire division staff and that the USAC CEO have comparable authority over division heads. The CEO will be answerable to the USAC Board in the first instance and ultimately to the Commission.

¹⁰ “In establishing an entity to review and process the applications, the Commission is merely contracting out administrative functions. All decisions regarding where the money should be going and how it should be distributed should—indeed *must*—be made by the Commission.” Statement of Commissioner Harold Furchtgott-Roth, July 15, 1998 (emphasis in original).

¹¹ Examples include the creation of service eligibility lists and rulings defining a qualifying extension of an existing contract.

¹² This approach assumes that the Commission has appropriate jurisdiction over the parties to the dispute. In the case of telecommunications service providers, the assumption is uniformly correct. It is not at all clear what power the Commission may

It is especially critical that parties have immediate resort to the Commission—and the benefit of Commission review—before a contested disbursement of funds under the program. For these cases, the Commission may wish to adopt mechanisms allowing expedited review, as it has done recently for certain formal complaints brought under Section 208, 47 U.S.C. Section 208.¹³ This system of direct Commission oversight, in conjunction with expedited adjudication, will help to minimize instances where funds are disbursed in error. When errors nevertheless occur, USAC (in its own right or through a contracted agent) should institute action to recover the funds from the benefit recipient. In no event should this collection effort be imposed on the service provider.

CONCLUSION

The Commission should approve the proposed merger of SLC and RHCC into USAC, which appears to offer certain internal efficiencies through consolidation of personnel and administrative functions. However, the Commission must also recognize that many implementation problems result from the inadequate oversight and guidance provided to USAC, SLC and RHCC, which have been compelled to implement a program still under development; and to the unwarranted extension of program eligibility to include internal connections. The Commission should also adopt measures to insure a more balanced composition of the USAC Board and the appointment of a nonvoting CEO of proven managerial ability. Neither USAC nor its component divisions should assume

have to adjudicate a dispute with a non-telecommunications carrier (*e.g.*, an equipment vendor).

¹³ In the Matter of Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 96-238, *Second Report and Order*, FCC 98-154, released July 14, 1998.

any role in the adjudication of disputes—this function is reserved to the Commission under the statutory provisions which created an expanded universal service program.

Respectfully submitted,

BELLSOUTH CORPORATION

By:



M. Robert Sutherland

Richard M. Sbaratta

Helen A. Shockey

Its Attorneys

Suite 1700

1155 Peachtree Street, N.E.

Atlanta, Georgia 30306-3610

(404) 249-3390

Date: August 5, 1998

CERTIFICATE OF SERVICE

I do hereby certify that I have this 5th day of August 1998 served the following parties to this action with a copy of the foregoing COMMENTS, Nos. by hand delivery or placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed on the attached service list.



Julia W. Spires

SERVICE LIST CC DOCKET NOS. 96-45, 97-21 and DA 98-1336

*The Honorable Susan Ness, Chair,
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

The Honorable Patrick H. Wood, III,
Chairman
Texas Public Utility Commission
1701 North Congress Ave.
Austin, Texas 78701

*The Honorable Harold Furchtgott-Roth,
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Martha S. Hogerty
Missouri Office Public Council
301 West High Street, Suite 250
Truman Building
Jefferson City, MO 65102

*The Honorable Gloria Tristani,
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Charles Bolle
South Dakota Public Utilities Commission
State Capitol, 500 East Capitol Street
Pierre, SD 57501-5070

The Honorable Julia Johnson, State Chair,
Chairman
Florida Public Service Commission
2540 Shumard Oak Blvd.
Gerald Gunter Building
Tallahassee, FL 32399-0850

Deonne Bruning
Nebraska Public Service Commission
300 The Atrium, 1200 N Street
P.O. Box 94927
Lincoln, NE 68509-4927

The Honorable David Baker,
Commissioner
Georgia Public Service Commission
244 Washington Street, S.W.
Atlanta, Georgia 30334-5701

*James Casserly
Federal Communications Commission
Commissioner Ness' Office
1919 M Street, N.W., Room 832
Washington, D.C. 20554

The Honorable Laska Schoenfelder,
Commissioner
South Dakota Public Utilities Commission
State Capitol, 500 East Capitol Street
Pierre, SD 57501-5070

Rowland Curry
Texas Public Utility Commission
1701 North Congress Avenue
P.O. Box 13326
Austin, TX 78701

Ann Dean
Maryland Public Service Commission
16th Floor, 6 Saint Paul Street
Baltimore, MD 21202-6806

Bridget Duff, State Staff Chair
Florida Public Service Commission
2540 Sumard Oak Blvd.
Tallahassee, FL 32399-0866

Barry Payne
Indiana Office of the Consumer Counsel
100 North Senate Avenue, Room N501
Indianapolis, IN 46204-2208

*Irene Flannery, Federal Staff Chair
Federal Communications Commission
Accounting and Audits Division
Universal Service Branch
2100 M Street, N.W., Room 8922
Washington, D.C. 20554

James Bradford Ramsey
National Association of Regulatory Utility
Commissioners
1100 Pennsylvania Ave., N.W.
P.O. Box 684
Washington, D.C. 20044-0684

*Paul Gallant
Federal Communications Commission
Commissioner Tristani's Office
1919 M Street, N.W., Room 826
Washington, D.C. 20554

Brian Roberts
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Lori Kenyon
Alaska Public Utilities Commission
1016 West Sixth Avenue, Suite 400
Anchorage, AK 99501

Mark Long
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0866

*Sheryl Todd
Federal Communications Commission
Accounting Policy Division
2100 M Street, N.W., Room 8606
Washington, D.C. 20554

Sandra Makeef
Iowa Utilities Board
Lucas State Office Building
Des Moines, IA 50319

*Kevin Martin
Federal Communications Commission
Commissioner Furchtgott-Roth's Office
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Philip F. McClelland
Pennsylvania Office of Consumer Advocate
1425 Strawberry Square
Harrisburg, PA 17120

*Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
1919 M Street, N. W., Room 222
Washington, D.C. 20554

*International Transcription Service, Inc.
1231 20th Street, N. W.
Washington, D. C. 20037

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